IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

WP(C).No. 25511 of 2007(K)

PETITIONER:

K.K.VENUGOPALAN,DRIVER,DISTRICT OFFICE,
MINING & GEOLOGY DEPARTMENT,AYYANTHOLE,THRISSUR.

BY ADV. SRI.K.JAJU BABU
SMT.M.U.VIJAYALAKSHMI
SMT.DHANYA CHANDRAN

RESPONDENTS:
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1. **STATE OF KERALA REPRESENTED BY THE PRINCIPAL SECRETARY TO GOVERNMENT, INDUSTRIES DEPARTMENT,GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.**

2. **THE DIRECTOR, MINING & GEOLOGY DEPARTMENT,THIRUVANANTHAPURAM.**

BY SR. GOVERNMENT PLEADER SRI. NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1:	**COPY OF THE CERTIFICATE ISSUED BY THE GENERAL HOSPITAL, ERNAKULAM DTD. 30/08/2005.**
EXT.P2:	**COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE GOVERNMENT DTD. 16/01/2006.**
EXT.P3:	**COPY OF THE LETTER OF THE 1ST RESPONDENT DTD. 18/03/2006.**
EXT.P4:	**COPY OF THE LETTER OF THE 2ND RESPONDENT TO THE 1ST RESPONDENT 22/07/2006.**
EXT.P5:	**COPY OF THE LETTER OF THE 1ST RESPONDENT TO THE 2ND RESPONDENT DTD. 16/03/2007.**
EXT.P6:	**COPY OF THE LETTER OF THE STATE COMMISSIONER FOR PHYSICALLY HANDICAPPED TO THE 2ND RESPONDENT DTD. 27/03/2007.**
EXT.P7:	**COPY OF THE REVIEW PETITION FILED BY THE PETITIONER TO THE 1ST RESPONDENT DTD. 23/04/2007.**
EXT.P8:	**COPY OF THE LETTER OF THE 1ST RESPONDENT TO THE 2ND RESPONDENT DTD. 19/07/2007.**
EXT.P9:	**COPY OF THE LETTER OF THE 2ND RESPONDENT TO THE GEOLOGIST, THRISSUR DTD. 12/08/2007.**
EXT.P10:	**COPY OF THE RELEVANT PAGES OF THE SSLC CERTIFICATE OF THE PETITIONER.**
EXT.P11:	**COPY OF THE B.COM DEGREE CERTIFICATE OF THE PETITIONER.**
EXT.P12:	**COPY OF THE ACCOUNT TEST CERTIFICATE OF THE PETITIONER.**

/TRUE COPY/

P.S.TO JUDGE

KSS

V.GIRI, J.

W.P.(C).No.25511 of 2007 K

Dated this the 7th day of November, 2007.

JUDGMENT

Petitioner joined service in the Department of Mining and Geology as driver in the year 1998. While so, he started suffering from hearing impairment and this progressed to an extent where he sustained a disability. Ext.P1 medical certificate shows that the Medical Board assessed his disability at 40%. In the circumstances, the petitioner became a disabled person as defined in the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995 {hereinafter referred to as '**the Act**'}.

2. Petitioner, finding it difficult to continue as a driver, applied for a category change. Though it was initially declined, the petitioner again moved the Government vide Ext.P2 requesting for a posting to a clerical post having the same scale of pay. Apparently,

by Ext.P3 reply, the Director for Mining and Geology was directed to report what is the equivalent post in which the petitioner can be accommodated. By Ext.P4 the Director reported that if a category change is permitted, the petitioner could be accommodated as a Lower Division Clerk and that there is actually a vacancy in the head office at Thiruvananthapuram. By Ext.P5 the Government informed the Director that though the scales of pay of the driver and that of the Lower Division Clerk are one and the same, the two posts cannot be considered as having the same rank and that the petitioner can only be accommodated as a peon in circumstances where he has been assessed as a disabled person and therefore unable to continue his functions as a driver. A reconsideration sought for by the petitioner as per Ext.P7 was also rejected under Ext.P8 taking the same stand. Exts.P5 and P8 have been challenged in the writ petition.

3. The respondents have filed a counter affidavit, inter alia, contending that the basic qualifications, duties and responsibilities of the Lower Division Clerk is different from that of a driver and the petitioner is not qualified to be appointed as Lower Division Clerk. Therefore, he cannot be granted a category change to the post of Lower Division Clerk. It is also pointed out in the counter affidavit that even if the petitioner is posted as a peon on category change, his pay would be protected in terms of Section 47 of the Act as such.

4. I heard Mr.Jaju Babu, learned counsel for the petitioner and learned Senior Government Pleader Mr.Nandakumar.

5. The main thrust of the petitioner's contention rests on Section 47 of the Act, which reads as follows:

> **47. Non-discrimination in Government employment:-**
>
> **(1) No establishment shall dispense with, or reduce in rank, an employee, who**

acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability.

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provision of this section."

6. The Act is intended to give effect to the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. 'Appropriate Government' is defined in section 2 A, as the '**State Government**' in relation to a State

Government or any establishment wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board.

7. '**Persons with disability**' is defined in Section 2(t) of the Act as "**a person suffering from not less than forty percent of any disability as certified by a medical authority**". It is Section 47 of the Act which is pressed into service in the present case.

8. The protection afforded to persons in Government employment under Section 47 extends to either dispensation of service or reduction in rank of an employee, who acquires a disability during his service. But in the proviso thereto, it is stated that if an employee is found to be unsuitable on account of the disability to discharge the functions of the post, which he was holding, he could be shifted to some other post with the same pay scale and service benefits. In other words, the proviso to

Section 47(1) of the Act provides for protection of the pay scale and other service benefits. The second proviso thereto goes one step further and mandates that if it is not possible to adjust an employee against any post, he may be kept in a supernumerary post until a suitable post is available or till he attains the age of superannuation, whichever is earlier. In other words, there is a protection contemplated under Section 47 to the following extent:

(a) A disabled person is granted protection as regards the post, which he holds, provided the disability is acquired during the service.

(b) If by reason of the disability he becomes unsuitable for the post, then protection is afforded to him by requiring the employer to shift him to some other post in the same scale of pay.

(c) If by reason of the disability, he is not suitable to hold any post, the employer is required either to create a supernumerary post or till a suitable post arises to accommodate the same

person till he attains the age of superannuation.

(d) Sub-Section (2) further mandates that no person shall be denied promotion merely on the ground of disability.

9. Section 47 of the Act would naturally have a pervasive effect in relation to action taken, in respect of employments in all establishments comprehended by the Act. The mandate imposed under Section 47of the Act, therefore, overrides any instruction under rules or notifications issued by the State under the Public Services Act or the Rules framed there under, insofar as it relates to the protection under Section 47 of the Act as such.

Reference is made to Section 72 of the Act which contemplates that the rules made therein shall be in addition to and not in derogation of any other law in force or any rules or order or instructions issued therein for the benefits of persons with disabilities. In other words, if there is already a law

enacted by the legislature or a rule or notification issued by the Government in a State enactment intended for the benefit of a person with disability, then the benevolent provisions of the Act in question will apply not in derogation of the former, but in addition to the same. Being a Central enactment, it also goes without saying that the provisions of the Act will have application overriding any contrary provisions contained either in a subordinate legislation or a notification or an executive order, as the case may be.

In the circumstances, the protection afforded under Section 47 of the Act enables the petitioner to claim that he be accommodated in a post with the same pay scale and service benefits. Going by the scale of pay applicable to the Driver and a Lower Division Clerk and a Peon, it seems that the petitioner is entitled to be accommodated as a Lower Division Clerk and not as a Peon. If this be so, then the

question of pay protection afforded under Section 47 de hors the pay scale really may not arise at all. On the other hand, if the petitioner is accommodated as a Peon, then the protection afforded under Section 47 will compel the Government to fit him in the post of Driver/ Lower Division Clerk, though he functions only as a Peon. The first alternative is not desirous especially when the petitioner is otherwise qualified to hold the post of a clerk, as evidenced by Exts.P10 to P12, which show that the petitioner is not only a Graduate in Commerce, but has also acquired test qualification in Account Test (Lower) conducted by the Public Service Commission.

The main reason put forth in the counter affidavit filed by the respondent to decline the petitioner a change to the post of a Lower Division Clerk is that the method of appointment and qualification in relation to the two posts of a driver and that of the Lower Division

Clerk are different. Apparently, this reason is given in terms of the executive orders relating to mutual inter-departmental, and inter-unit transfers as contained in G.O.(P)No.4/61. As I have already mentioned above, assuming that there is any executive instruction or a rule which interdicts a category change of persons on the premise that the method of appointment and qualification for the post occupied by the disabled person and the post to which he seeks a category change are different, the crucial aspect to be considered in terms of Section 47 of the Act is whether the two posts are carrying the same scale and also afford the same service benefits to the petitioner. If this be the criteria, then it becomes clear that the petitioner is entitled to be given a category change to the post of Lower Division Clerk. The stand taken by the Government in Exts.P5 and P8 cannot be sustained in the light of Section 47 of the act. In my view, the petitioner's

contention, is supported by the decision of the Supreme court in **{2004(6) SCC 708}** and the decision of the Full Bench of this court in **{2006(4) KLT 983 FB}** wherein this court and the Supreme Court has considered the scope and ambit of Section 47 of the Act to the factual situation which came up for consideration therein.

For all these reasons, the writ petition is allowed. Exts.P5 and p8 are set aside. First respondent is directed to pass fresh orders granting the petitioner a category change to the post of Lower Division Clerk in the Department of Mining and Geology, in the light of the observations made above. Necessary orders shall be passed within one month from the date of receipt of a copy of this judgment.

Sd/-
(V.GIRI)
JUDGE

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